

# CRIMINAL YEAR SEMINAR

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Webinar



## DEFENSE PERSPECTIVE

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# **DEFENSE PERSPECTIVE**

## **APAAC Criminal Year Seminar**

### **2021**

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# Trends

- Efforts to Expand Victims' Rights
- Consecutive Sentencing - A.R.S. § 13-116 and Double Jeopardy

# Efforts to Expand Victim's Rights

- *State v. Reed*, 248 Ariz. 72 (2020)
- *State v. Reed*, \_\_\_\_ Ariz. \_\_\_\_, 2020 WL 8678504 (App. 2020)
- *E.H. v. Slayton*, 249 Ariz. 248 (2020)
- *Fay v. Fox (Hanson, Real Party in Interest)*, 1 CA-SA 20-0123 (App., Div. 1, August 20, 2020)
- *State v. Patel*, 247 Ariz. 482, 484 ¶ 8 (App. 2019), *review granted*
- Defense challenges

## ***State v. Reed*, 248 Ariz. 72 (2020)**

We here decide whether the legislature possessed authority to enact [§ 13-106](#), and, if so, whether [§ 13-106\(A\)](#) nevertheless violates our state constitution by divesting defendants of their right to appeal. See [Ariz. Const. art. 2, § 24](#). We conclude that the legislature lacked authority to require the court to dismiss a pending appeal upon a convicted defendant's death ([§ 13-106\(A\)](#)), but possessed authority to prohibit abatement of that defendant's conviction and sentence ([§ 13-106\(B\)](#)). We vacate the court of appeals' opinion dismissing Reed's appeal and remand to that court for further proceedings.

## ***State v. Reed, 248 Ariz. 72 (2020)***

¶24 We also disagree with the State that [§ 13-106\(A\)](#) preserves and protects victims' rights as guaranteed by VBR [§§ 2.1\(A\)\(1\) & \(8\)](#). Subsection (A)(1)'s requirement that victims "be treated with fairness, respect, and dignity, and ... be free from intimidation, harassment, or abuse, throughout the criminal justice process" concerns treatment of victims in the criminal justice process; *it does not create rights to any particular disposition.*

## ***State v. Reed, 248 Ariz. 72 (2020)***

¶24 ... Subsection (A)(8)'s declaration that victims must "receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury" is unique and peculiar to victims. But *this right contemplates the entry of a restitution order that is subject to appellate scrutiny*, which may result in reversal or modification of the order. Because *subsection (A)(8) does not guarantee victims any particular appellate disposition*, [§ 13-106\(A\)](#)'s required disposition does not affect a victim's right to payment of prompt restitution.

# ***State v. Reed, 2020 WL 8678504 (App. 2020), review pending***

- After an evidentiary hearing, the superior court issued a restitution order awarding the victim \$17,909.50 in attorneys' fees and granting in part and denying in part other requested restitution.
- ¶15 On this record, Reed's counsel has failed to show the superior court erred in finding the attorneys' fees were economic loss and therefore recoverable as restitution. The court could properly conclude the attorneys' fees the victim sought were an economic loss she incurred "as a result of the commission" of the crime by Reed "that would not have been incurred but for the offense." [A.R.S. § 13-105\(16\)](#).



## ***E.H. v. Slayton, 249 Ariz. 248 (2020)***

¶1 Victims have a statutory right to receive full restitution for economic loss caused by a defendant. [A.R.S. § 13-603\(C\)](#); see also [Ariz. Const. art. 2, § 2.1](#)(A)(8) (providing that victims have a right to receive “prompt restitution”). *Here, we hold that the practice of placing a cap on the amount of restitution a defendant may be liable for in a plea agreement, without the victim’s consent, violates the right to restitution.*

## ***E.H. v. Slayton*, 249 Ariz. 248 (2020)**

There is no constitutional requirement to inform a defendant of a specific amount of restitution or to cap the amount of restitution that a court may order, and thus we overrule [\*State v. Lukens\*, 151 Ariz. 502, 729 P.2d 306 \(1986\)](#), [\*State v. Phillips\*, 152 Ariz. 533, 733 P.2d 1116 \(1987\)](#), and [\*State v. Crowder\*, 155 Ariz. 477, 747 P.2d 1176 \(1987\)](#) for that proposition.

## ***E.H. v. Slayton, 249 Ariz. 248 (2020)***

¶8 .... By entering into agreements that capped the amount of restitution available to E.H., the State and defendants effectively waived E.H.'s statutory right to restitution for her full economic losses. *A victim may agree to a restitution cap as part of a plea agreement, and thereby forego her statutory right to full restitution, if that amount exceeds the cap, but the prosecutor may not do it for her.*

## ***E.H. v. Slayton, 249 Ariz. 248 (2020)***

¶11 Moreover, *restitution caps without the victim's consent are ultimately illusory* because the State lacks authority to waive a victim's restitution right. And the trial court also lacks authority to enforce a cap because pursuant to [§ 13-603\(C\)](#) and [A.R.S. § 13-804\(B\)](#), it must award the victim the amount of proven economic loss.

# ***E.H. v. Slayton*, 249 Ariz. 248 (2020)**

Impact on Plea Negotiations and Restitution Hearings?

## ***E.H. v. Slayton*, 249 Ariz. 248 (2020)**

¶2 Additionally, we hold that a lawyer representing a victim has a presumptive right to sit in front of the bar in the courtroom during a proceeding where a victim's constitutional or statutory rights are at issue.

***Fay v. Fox (Hanson, Real Party in Interest), 1  
CA-SA 20-0123 (App., Div. 1, August 20, 2020)***

*Review granted, September 21, 2020, CR-20-0306-PR, oral  
argument held January 14, 2021, decision pending*

# ***Fay v. Fox (Hanson, Real Party in Interest), 1***

## **CA-SA 20-0123 (App., Div. 1, August 20, 2020)**

- Held: crime victim may not intervene to oppose defendant's petition for a delayed appeal from a restitution order in victim's favor, under Ariz. R. Crim. P. 32.1(f).
- “We discern no constitutional, statutory, or rule-based right for [the victim] to weigh in on whether [the defendant] is at fault” for the delay in filing a notice of appeal, which is the only question presented under Rule 32.1(f).



# ***Fay v. Fox (Hanson, Real Party in Interest), 1***

## **CA-SA 20-0123 (App., Div. 1, August 20, 2020)**

- In other words, the victim's right to "prompt restitution" under the Victims Bill of Rights, Ariz. Const. Art. 2, § 2.1(A), does not trump the defendant's right to a delayed appeal under that rule.
- The Supreme Court framed the issue as, "Is a victim entitled to be heard on a Rule 32.1(f) Request for Delayed Appeal concerning restitution?"

# ***State v. Patel, 247 Ariz. 482, 484 ¶ 8 (App. 2019), review granted***

- Division One held that victim's right to "prompt restitution" under the VBR is also a right to *full* restitution.
- Therefore, the Court invalidated the cap on restitution for convictions for certain traffic offenses that result in death or serious physical injury under A.R.S. § 28-672.
- Oral argument May 2020, decision still pending

# Defense Challenges

- Section 13-4437(A):  
The rights enumerated in the victims' bill of rights, article II, section 2.1, Constitution of Arizona, any implementing legislation, or court rules belong to the victim.... ***In asserting any right, the victim has the right to be represented by personal counsel at the victim's expense*** and the proceedings may be initiated by the victim's counsel or the prosecutor.

# Defense Challenges

- A.R.S. §13-804(G): “The state does not represent persons who have suffered economic loss at the [restitution] hearing but may present evidence or information relevant to the issue of restitution.”
- But, A.R.S. §13-4437(C) and Rule 39(d)(1), the prosecutor has a duty to advocate for the victim upon request.
- Also, victims’ lawyers may not act as “an adjunct prosecutor,” *State v. Slover*, 220 Ariz. 239, 243 ¶¶8-9 (App. 2009)

# Defense Challenges

- Finally, permitting victims to seek attorney fees against criminal defendants through criminal restitution violates the public policy choice of the Legislature to carefully circumscribe the availability of attorney fees.

*R.S. & E.S. v. Thompson (Vanders, RPI), \_\_\_\_*  
Ariz. \_\_\_\_ (April 29, 2021)

Victim's right to deny discovery requests and the physician/patient privilege must yield to defendant's request for *in camera* review of victim's medical records where the defendant can show there is a *reasonable possibility* those records contain information necessary for the defendant's right to present a complete defense and to receive a fair trial.

# Consecutive Sentencing - A.R.S. § 13-116 and Double Jeopardy

- *State v. Watson*, 248 Ariz. 208 (App. 2020)
- *State v. Robertson*, 249 Ariz. 256 (2020)
- *State v. Nunn*, 250 Ariz. 366 (App. 2020)

## A.R.S. § 13-116

- *An act* or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent....



## ***State v. Gordon, 161 Ariz. 308, 315 (1989)***

- First, after subtracting evidence necessary to convict on “ultimate crime” does sufficient evidence remain to convict on other crime. If not, then consecutive sentencing barred.
- Second, is it factually possible to commit the ultimate crime without committing the other crime? If not, no consecutive sentences.
- Third, did the defendant expose the victim to additional harm by committing the secondary crime beyond that inherent in the ultimate crime? If so, consecutive sentences usually allowed.

# ***State v. Watson*, 248 Ariz. 208 (App. 2020)**

- Held: § 13-116 bars the imposition of a consecutive term of probation where a consecutive prison sentence would also be illegal.

# ***State v. Robertson*, 249 Ariz. 256 (2020)**

The “invited error” doctrine cannot be applied to enforce an illegal sentence negotiated as part of a plea agreement.

## ***State v. Nunn*, 250 Ariz. 366 (App. 2020)**

- Possession of illegal drugs is a lesser-included offense of promoting prison contraband where the drugs and the contraband are the same.
- Therefore, double jeopardy prohibits convictions for both promoting prison contraband and possession of illegal drugs for the same substance.

# QUESTIONS?

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